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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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ZYLPHA S. BUETTNER, MARY ELIZABETH BUETTNER MOORE, PHILLIP BUETTNER, CHARLES BUETTNER, ROBERT BUETTNER and JOHN BUETTNER, Minors, by and through their mother and next friend, Zylpha S. Buettner, *Petitioners*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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No.

ZYLPHA S. BUETTNER, MARY ELIZABETH BUETTNER MOORE, PHILLIP BUETTNER, CHARLES BUETTNER, ROBERT BUETTNER and JOHN BUETTNER, Minors, by and through their mother and next friend, Zylpha S. Buettner, *Petitioners*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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Zylpha S. Buettner, Mary Elizabeth Buettner Moore and Phillip Buettner, and Charles Buettner, Robert Buettner and John Buettner, Minors, by and through their mother and next friend, Zylpha S. Buettner, your Petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above cause on October 16, 1968.

## OPINIONS BELOW

The Order of the Circuit Court of Arlington County, entered January 18, 1968, is unreported, and is printed in Appendix A hereto, *infra*, p. 9. The Opinion of the

Supreme Court of Appeals of Virginia, entered October 16, 1968, is unreported and is printed in Appendix B hereto, *infra*, p. 10.

## QUESTION PRESENTED

Whether the State Highway Commission violates the Due Process Clause of the 14th Amendment of the Constitution of the United States by the exercise of eminent domain pursuant to a State statute which grants the Highway Commission the right to take title to private property by the filing of a certificate of deposit in the County Clerk's Office without notice to the private land owner and without the institution of condemnation proceedings.

## STATUTES INVOLVED

The following statutory provisions are set forth in Appendix C, *infra*, p. 11: Sections 25-46.8, 33-57.3, 33-70.4, 33-70.11, and 33-75 of the 1950 Code of Virginia.

## STATEMENT

Petitioner Zylpha S. Buettner, along with her five children, has for some years made her home at 1011 North Buchanan Street, in Arlington, Virginia. This home is situated on a double lot. The lot on which the house itself sets became her sole property on the death of her husband. The adjoining lot, which is the yard, passed by the laws of intestate possession to Mrs. Buettner and all the children. Two of the children are now grown and emancipated, and three of the children remain with their mother.

The Respondent, through its agent, the State Highway Commission, recorded among the land records of Arlington County, Virginia a certificate of deposit on August 11, 1966 in Deed Book 1630, at page 595. No notice of the filing of this certificate of deposit was served on Petitioners. The recordation of said certificate of deposit purported to divest a defeasible title in the Commonwealth of Virginia to Lots 5A and 5B. This constituted the lot upon which stood the house of the widow Buettner. No proceedings to

condemn land were instituted. The Commonwealth had acquired the land immediately adjacent to Petitioners' land to secure residential homes for the purpose of permitting selected employees of the Commonwealth of Virginia and their families to have homes in which to live free of charge.

One month short of a year later—to wit, on July 12, 1967—the Commonwealth of Virginia filed a second certificate of deposit (a certificate that was dated August 18, 1966) in the land records of Arlington County, in Deed Book 1651, at page 313, the recordation of which purported to vest a defeasible title in the Commonwealth of Lot 6, being the yard of the house.

Still no notice of the filing of this certificate was served upon or sent to Petitioners, and no condemnation proceedings were instituted. On the 21st day of November, 1967 Petitioners filed their Bill of Complaint to quiet title to the land and remove the cloud upon their title that said certificates created. Thereafter the Respondent filed its motion to dismiss and at the same time filed condemnation petitions on both lots on the 11th day of December, 1967, based upon a claim of title dating back to the filing of each certificate of deposit. The trial court granted the motion to dismiss, and timely petition for appeal to the Supreme Court of Appeals of Virginia was denied by that Court.

## REASONS FOR GRANTING THE WRIT

The State of Virginia, pursuant to Section 33-70.4 of the Code of Virginia, has created for the convenience of the State Highway Commission a streamlined form for the exercise of eminent domain, which form provides that the Highway Commission may file a certificate of deposit in the land records of the County where the property is located, whereupon the Commonwealth of Virginia immediately becomes vested with a defeasible title in the land. The private land owner receives no notice and no condemnation proceedings are required.

The land owner, without notice of the taking of his land, is given but limited rights to petition the Circuit Court a year later to secure permission to determine adequate consideration under certain conditions (Section 33-75 of the Code of Virginia). This streamlined procedure is made available only to the State Highway Commission, which is exempt by reason of Section 33-57.3 of the Code of Virginia from utilizing the requirements of Title 25 of the Code of Virginia, and particularly Section 25-46.8 which requires a hearing by the Court before the Commonwealth can enter upon private land prior to a condemnation trial.

The so-called streamlined procedure—to wit, the utilization of a certificate of deposit by the State Highway Commission, which gives no notice to the land owner that he has lost his land to the State—violates the Due Process Clause of the 14th Amendment of the Constitution of the United States.

This is the federal question in this case, which question was duly presented in the State court in the original Bill of Complaint to quiet title to land filed in the Circuit Court of Arlington County, and to the Supreme Court of Appeals of Virginia which by its denial of the petition for appeal ruled that the decree of the trial court was plainly right.

In *Bragg v. Weaver* (1919), 251 U.S. 57, this Court held, in affirming a decree of the Circuit Court of Lunenberg County, Virginia, refusing to enjoin a trespass by the Virginia Highway Commission against the taking of earth from appellant's land to be used in the repair of a road, as follows:

> "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. (Citations omitted.)

> "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial."

And more recently this Court has ruled that the Due Process Clause requires that an owner whose property is taken by a State must be given a hearing in determining just compensation, and that the right to have such a hearing is meaningless without a provision to give the owner notice of the taking. The case referred to is *Walker v. Hutchinson* (1956), 352 U.S. 112, in which opinion Mr. Justice Black stated:

> "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. . . . ."

The significant part of the State of Virginia's streamlined condemnation procedure (Section 33-70.4), which renders it contrary to the Due Process Clause of the 14th Amendment, is the absence of the requirement of notice or of any manner of court proceeding. The courts of Virginia and this Court have repeatedly held that a governmental agency may take possession of property before the actual hearing on the value. However, in all such cases where this has been permitted, the taking of possession prior to the actual hearing on the value, has been a part of the procedure involved in a court proceeding wherein the land owner was served with notice of the condemnation.

In the case of *Bailey v. Anderson*, 326 U.S. 203, a case that went to the Supreme Court of the United States from the Supreme Court of Virginia, the Supreme Court of the United States stated as follows:

> "[Appellant claimed that] Section 1969j(4) infringes the asserted constitutional immunity by sanctioning Appellee's entry upon the land and the alteration of its physical condition in advance of the appointment of the Commissioners and before they could view the land for the purpose of fixing its fair value upon condemnation. But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, *provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.*" [italics supplied]

It should be noted that Section 1969j(4) was a section of Mitchie's 1942 Code which, in the 1950 Code of Virginia, became Section 33-70 and which section was repealed by the Acts of 1958 at the time of the enactment of the streamlined procedure of Section 33-70.4.

The Court's attention is directed to the case of *Angle v. Commonwealth* (1959), 396 Pa. 514, 153 A.2d 912, a case arising in Pennsylvania, wherein the filing of a plat by the Highway Department among certain official records was claimed to be a notice of taking to the land owner of certain of his rights. In an opinion written by Justice Musmanno this proceeding was struck down as being unconstitutional, with the Court noting that the rudimentary requirements of due process in eminent domain proceedings is that the land owner shall know that his land is being taken or is about to be taken. The Court also said in that case:

> "Without notice to a land owner that the Commonwealth intends to take his property, the Commonwealth acquires no higher rating than that of an individual trespasser who transgresses on land which does not belong to him."

Similarly, in a case from the Supreme Court of North Carolina, *City of Randleman v. Hinshaw* (1966), 267 N.C. 136, 147 S.E.2d 902, the Court there held—in citing with approval an earlier decision of the same Court:

> "The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard."

Section 33-70.4 of the Code of Virginia requires no notice, and has indeed streamlined away all of the Petitioners' rights as guaranteed by the Due Process Clause of the 14th Amendment of the Constitution of the United States.

The question presented here, although a simple one, is of great importance—not only to the Petitioners, but to all land owners in the Commonwealth of Virginia who stand the possibility of having their land taken by the State Highway Commission without notice to them, and without the ordinary procedures of a judicial condemnation proceeding. The question of the Constitutionality of the streamlined procedure of the use of the certificate of deposit goes to the very heart of the State's exercise of its right of eminent domain, the manner of which has always been within the unlimited discretion of the State Legislature so long as the private land owner's Constitutional rights are protected by the procedure, thus making it essential that this Court now determine whether the certificate of deposit procedure does meet the Constitutional requirement of Due Process.

## CONCLUSION

To protect the Petitioners and all land owners in the Commonwealth of Virginia from the taking of their land by the State Highway Commission by the filing of a certificate of deposit in the land records, without notice to the land owner and without a judicial condemnation proceeding, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK P. FRIEDLANDER
MARK P. FRIEDLANDER, JR.
BLAINE P. FRIEDLANDER
HARRY P. FRIEDLANDER
*Attorneys for Petitioners*

## APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ZYLPHA S. BUETTNER, et al.,
*Plaintiffs*

v.

IN CHANCERY
NO. 17962

COMMONWEALTH OF VIRGINIA,
*Defendants*

### ORDER

This matter came on to be heard upon the Defendant's Motion to Dismiss the Bill of Complaint and upon the Defendant's Motion to quash the taking of the depositions filed herein; and

IT APPEARING TO THE COURT after argument of counsel that the Complainant has an adequate remedy at law and this cause should therefore be dismissed; is is therefore

ADJUDGED, ORDERED AND DECREED that this cause be dismissed, but without prejudice as to the right of the Plaintiffs to raise by way of defense, in any other action, the other questions or points raised in the above-captioned cause.

AND THIS DECREE IS FINAL.

AND TO THIS DECISION PLAINTIFFS DULY NOTE THEIR OBJECTION AND EXCEPTION.

ENTERED: 1/18/68

/s/ Paul D. Brown
Judge

PHILLIPS, KENDRICK, GEARHEART
& AYLOR
By: /s/ William B. Moore,
Counsel for Defendant

SEEN AND OBJECTED TO. EXCEPTION NOTED:

FRIEDLANDER & FRIEDLANDER
By: /s/ Mark P. Friedlander, Jr.
Counsel for Plaintiffs

## APPENDIX B

VIRGINIA:

*In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 16th day of October, 1968.*

The petition of Zylpha S. Buettner; Mary Elizabeth Buettner Moore; Phillip Buettner; and Charles Buettner, John Buettner and Robert Buettner, minors, by their mother and next friend, Zylpha S. Buettner, for an appeal from a decree entered by the Circuit Court of Arlington County on the 18th day of January, 1968, in a certain proceeding then therein depending, wherein the said petitioners were plaintiffs and Commonwealth of Virginia was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the said decree is plainly right, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

/s/ H. G. Turner
Clerk

## APPENDIX C

### 1950 CODE OF VIRGINIA

§ 25-46.8. **Right of entry upon property.**—Unless otherwise provided by law, any petitioner may enter upon the property to be condemned at any time after the filing of its petition for condemnation and prior to the determination and deposit of the award of just compensation in the manner provided in this chapter, for the purpose of constructing its works or improvements thereon in the manner proposed by the petitioner if, upon the petitioner's application to do so, the court, after twenty-one days' notice thereof has been served on the owners mutatis mutandis in the same manner as is provided in §§ 25-46.9, 25-46.10, 25-46.11 and 25-46.12, and after a hearing thereon finds (1) that a public necessity or an essential public convenience requires such entry for such purposes, and that an emergency exists justifying such entry, before the time when just compensation can be determined and the amount so determined paid into court, and (2) that the interests of the owners of such property will be adequately protected by the payment into court for the benefit of the owners of the amount of the offer made in accordance with § 25-46.5 and, in the discretion of the court, the giving of a surety bond in an amount and with such surety as the court may determine. Upon such payment and the giving of such bond, if any is required, with surety in the office of the clerk or with the court, conditioned as required by law and to the effect that the petitioner and its surety or sureties are bound to the owners of the property to be taken or damaged to secure to each of them payment of just compensation therefor as finally determined in the condemnation proceedings, the petitioner shall have the right to enter and construct its works or improvements upon or through the property as described in its petition. At any time after such payment into court, a party whose property or interest therein is to be taken or damaged may apply to the court for the withdrawal of his share thereof in the manner provided in § 25-46.30.

At any time during the condemnation proceedings, if it appears necessary so to do in order to protect the owners of the property or estate or interest therein to be condemned and assure unto them the payment of just compensation to which they are entitled, the court may require the petitioner to give a new and additional bond in an amount and with sureties satisfactory to the court.

If the petitioner enters upon the property under this section and does any work thereon, or causes any injury or damage to such property, it shall not thereafter be entitled, without the consent of the owner, to abandon the proceedings for the condemnation thereof, but shall conduct such proceedings with reasonable dispatch to final judgment and the petitioner shall pay to the owner of the property or into court the amount of just compensation as determined in the condemnation proceedings. (Code 1919, § 4362; 1924, p. 60; Code 1950, §§ 25-3, 25-4; 1962, c. 426.)

**§ 33-57.3. Limitations in Title 25 not applicable to Commissioner.**—The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title. (1964, Ex. Sess., c. 23.)

**Effective date.**—The act inserting this section became effective Dec. 12, 1964.

**§ 33-70.4. Recordation of certificates; transfer of title or interest; land situate in two or more counties or cities.**—The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible

until the reaching of an agreement between the Commissioner and such owner, as provided in § 33-70.11, or the compensation determined by condemnation proceedings as hereinafter provided.

If the land affected by the certificate aforesaid is situate in two or more counties or cities, the clerk of the court wherein the certificate is recorded, shall certify a copy of such certificate to the clerk of the court of the counties or cities in which any portion of the land lies, who shall record the same in his deed book and index it in the name of the person who had the land before and also in the name of the Commonwealth. (1958, c. 581.)

**§ 33-70.11. Agreements as to compensation; petition and order of court thereon; disposition of deposit.**—At any time after the recordation of such certificate, but prior to the institution of condemnation proceedings, if the Commissioner and the owner, or owners of the land or interest therein taken or damaged are able to agree as to compensation for the land taken and damages, if any, caused by such taking, the Commissioner shall file with the court a petition so stating, with a copy of the agreement attached. If condemnation proceedings are already pending at the time of reaching such agreement, no such petition shall be required, but the motion for dismissal of such proceedings shall contain an averment that such agreement has been reached. Upon the filing of such a petition, or a motion to dismiss, as herein provided, the court shall thereupon enter an order confirming absolute and indefeasible title to the land or interest therein in the Commonwealth. Such order shall be spread in the current deed book, and reference be made showing the book and page number recordation on the margin of the page where the certificate was spread. Upon entry of such order, the Commissioner and State Treasurer shall be relieved of further obligation by virtue of having filed such certificate of deposit with the court.

If it shall appear from such petition and agreement, or motion to dismiss a pending suit, that no person or persons

other than those executing such agreement are entitled to the fund on deposit, the court shall direct that such fund after payment therefrom of any taxes which may be charged against such land taken, be disbursed and distributed in accordance with the statement or charge in the petition, or motion, among the parties or persons entitled thereto. If it shall appear that a controversy exists as to the persons entitled to such fund, such distribution shall be made in accordance with the provisions of § 33-70.6 of the Code. (1958, c. 581.)

**§ 33-75. Remedy of landowners under certain conditions.**—Whenever the Commissioner enters upon and takes possession of property under the provisions of §§ 33-70 and 33-74 and has not completed the construction of the highway project after a reasonable time for such purpose has elapsed or has not instituted condemnation proceedings within sixty days after completion of the construction of the highway project, or within one year after he has entered upon and taken possession of the property, whether the construction of the highway project has been completed or not, the property owner may, if no agreement has been made with the Commissioner as to compensation and damage, if any, petition the circuit court of the county in which the greater portion of the property lies, or the judge thereof in vacation, for the appointment of commissioners to determine just compensation for the property taken and damages done, if any. A copy of such petition shall be served upon the Commissioner at least ten days before it is presented to the court, or the judge thereof in vacation and the Commissioner shall file an answer thereto within five days after the petition is so presented. If it be found by the court, or the judge thereof in vacation, that a reasonable time has elapsed for the completion of the construction of the highway project or that sixty days have elapsed since the completion of the construction of the highway project or that more than one year has elapsed since the Commissioner entered upon and took possession of the

property, without condemnation proceedings being instituted and without an agreement having been made between the property owner and the Commissioner as to compensation and damages, if any, commissioners shall be appointed to ascertain the amount of compensation to be paid for the property taken and damages done, if any. The proceedings shall thereafter be governed by the procedure prescribed by §§ 33-59 to 33-67 insofar as the same may be applicable. (1944, p. 584; Michie Suppl. (946, § 1969j(7).)